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Supreme Court, U.S.
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No. 95-1154

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

DALKON SHIELD CLAIMANTS TRUST,

Petitioner,

v.

SUSAN SHADBURNE-VINTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Many of the numerous misstatements of the law contained in Shadburne's Brief in Opposition to the Petition for Certiorari (the "Shad. Opp.") are addressed at Part II of this reply brief, *infra*. More significant for purposes of this petition for certiorari, however, is Shadburne's conspicuous refusal even to mention -- let alone to explain adequately -- a single one of the five state and two federal appellate decisions cited in the Petition as being in conflict with the

Court of Appeals decision here. *See* Part I, *infra*. Shadburne's tacit admissions on these and other points demonstrate that the issue presented is worthy of this Court's attention and the Petition should accordingly be granted.

I. Shadburne has conceded the points pertinent to this Court's decision on certiorari.

A. Shadburne has conceded that the Court of Appeals decision conflicts with the decisions of state appellate courts.

The Trust pointed out in the Petition that the Court of Appeals decision conflicts with the rulings of the appellate courts of five states. (Petition at 3, 8-10.) Shadburne declines to address a single one of these rulings in her opposition. In so doing, Shadburne has effectively conceded that the Court of Appeals decision conflicts on a federal constitutional issue with one or more state courts of last resort, warranting review pursuant to this Court's Rule 10.1(a).

B. Shadburne has conceded that the Court of Appeals decision conflicts with the decisions of federal appellate courts.

The Trust pointed out in the Petition that the Court of Appeals decision conflicts with the rulings of the Eighth and Ninth Circuits. (Petition at 3, 10-11.) Again, Shadburne simply ignores these rulings in her opposition, thereby effectively conceding that the Court of Appeals decision conflicts on a federal constitutional issue with one or more other federal courts of appeals, further warranting review pursuant to Rule 10.1(a).

C. Shadburne has conceded that the Court of Appeals decision carries great precedential significance.

Shadburne half-heartedly offers the conclusory statement that the question presented here is "narrow and

non-precedential." (Shad. Opp. at 3.) Yet she quickly retreats from her unsupported contention, as she asserts that the Trust's position would affect "not only victims of the Dalkon Shield, but also [] the asbestos victims and [] thousands of women injured by silicone breast implants, who have yet to have their day in court." (Shad. Opp. at 5.) Indeed, her new counsel of record filed an *amicus curiae* brief in the Court of Appeals on behalf of the Oregon Trial Lawyers Association, and four other entities have filed *amicus* briefs either in the Court of Appeals or before this Court. Shadburne cannot dispute that the issue presented has far-reaching consequences.

D. Shadburne has conceded that the Court of Appeals overruled this Court's precedents.

Shadburne does not dispute that by electing not to follow the *Danzer/Chase* rule the Court of Appeals violated the rule that only this Court has the authority to overrule one of its decisions. *Rodrigues de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989).

II. The *Danzer/Chase* rule remains good law and precludes the action of the Oregon legislature in this case.

The foregoing points standing alone demonstrate that this Court should grant the Petition to resolve the conflict regarding this important constitutional issue. Even if not for those points, the case would still deserve this Court's attention because, as reflected by Shadburne's arguments, the Court of Appeals decision is simply wrong.

A. The *Danzer/Chase* rule is not altered by the more recent Supreme Court cases upon which Shadburne relies.

Shadburne states:

> By its petition, the [Trust] would have the Court reject and reverse twenty years of consistent constitutional decisions by this

> Court and lower federal courts upholding the retroactive application of a legislature's power to modify its own statutory immunities, as against due process claims.

(Shad. Opp. at 4.) Shadburne cannot, however, cite a single case in which this Court has upheld a legislature's retroactive modification of statutory immunities. The only time that this Court has ever been confronted with such a modification is when it struck down the statute at issue in *Danzer*. Shadburne also states:

> What [the Trust] seeks here from this Court is truly revolutionary -- to create a new constitutional right never before recognized in any reported decision: *an irrevocable immunity from litigation.*

(Shad. Opp. at 10) (emphasis in original). Contrary to this misstatement, such a right was recognized by this Court in *Danzer*, as well as the five state and two federal appellate decisions cited in the Petition but omitted in the Shad. Opp.

At bottom, much of Shadburne's argument amounts to a bald assertion that there has been some sweeping change in the fundamental premises of constitutional analysis since the time of *Danzer* and *Chase*, such that the Court of Appeals was right to disregard those on-point decisions. Neither Shadburne nor the Court of Appeals ever identifies this mysterious change. Indeed, the Shad. Opp. makes no effort to respond to the point pressed unambiguously in the Petition that the triumvirate of cases upon which the Court of Appeals relied (*Turner Elkhorn*, *Gray* and *General Motors v. Romein*) did not present the question of the constitutionality of a legislative revival of an extinguished cause of action. (Petition at 11-15.)[1/]

[1/] Shadburne states that neither *Turner Elkhorn*, *Gray* nor *General Motors v. Romein* "turn[s] on an artificial distinction between substantive and procedural rules of timeliness." (Shad. Opp. at 6.)

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It may be that Shadburne's unarticulated change in the law relates somehow to the view that the Court struck down legislation on several occasions in the early part of this century because the Court disagreed with the legislation's underlying economic philosophy. *See Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963). Such an analysis based on a loose rendition of constitutional history has no place here. The only issue presented in *Danzer* was the constitutional significance of the grant of immunity effected by the expiration of a timeliness provision; questions of economic theory, freedom to contract, freedom from government economic regulation and other supposed hallmarks of constitutional jurisprudence unique to that era were not presented. Further, the two justices who most vehemently dissented from those kinds of decisions were Justices Holmes and Brandies. *See Ferguson*, 372 U.S. at 729. These two justices voted with the unanimous Court in *Danzer*. In addition, even under the loosest version of constitutional history, by the time that *Chase* was decided in 1945, the so-called *Lochner* era from the early part of the twentieth century was over.

Finally, even if there was a fundamental change in the law justifying departure from the *Danzer/Chase* rule, its announcement should come from this Court, not the Court of Appeals.

B. *Danzer* applies to statutes of repose.

As an alternative to arguing that *Danzer* is bad law, Shadburne proposes that *Danzer* should not apply to statutes of repose. (Shad. Opp. at 10-12.) Shadburne denigrates the statute of repose case law as consisting of mere choice of law decisions, holding only that statute of repose analysis is

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The reason for this is obvious: none of those cases involved enlargement of a timeliness rule.

governed by the law of the state whose substantive law controls. Shadburne asserts that the statute of repose cases are therefore unfit for application to constitutional analysis.

Shadburne concedes, however, that the Special IUD Statute "withdrew a statutory **immunity**." (Shad. Opp. Questions Presented for Review) (emphasis added). Shadburne also does not deny that statutes of repose are "substantive" in the sense that they extinguish rights and statutes of limitations are procedural in the sense that they merely bar remedies. It is also clear that the aspect of the timeliness rule in *Danzer* that led this Court to conclude that the rule could not constitutionally be enlarged is that it was designed to extinguish rights, i.e., confer immunity, not merely bar remedies. *See Danzer*, 268 U.S. at 636. It is therefore undisputed that the defining features of statutes of repose are precisely the features that made the enlargement of the timeliness rule in *Danzer* constitutionally infirm.

In addition to contravening this parallel between the *Danzer/Chase* rule and the statute of repose case law, Shadburne's wall between choice of law cases and the *Danzer/Chase* rule is refuted by *Chase*, in which this Court unambiguously linked the choice of law analysis in *Davis v. Mills*, 194 U.S. 451 (1904), with the constitutional issue decided in *Danzer*. In *Davis v. Mills*, this Court held that although forum law typically governs with respect to statutes of limitation, "courts have been willing to treat limitations of time as standing like other limitations and cutting down the defendant's liability wherever he is sued" provided that the limitations rule "was directed to the newly created liability so specifically as to warrant saying that it qualified the right." *Id.* at 454. Significantly, in *Chase*, after reciting the constitutional holding in *Danzer*, the Court noted the following with respect to *Davis v. Mills*, which, until then, had been only a choice of law case:

> Read with the *Danzer* case, *Davis v. Mills* stands for the proposition that the result may be the same if the period of limitation is prescribed by a different statute if it 'was directed to the newly created liability so

> specifically as to warrant saying that it qualified the right.'

325 U.S. at 312 n.8. Similar analysis appeared in *Campbell v. Holt*, 115 U.S. 620 (1885), where the Court relied upon choice of law authorities in holding that retroactive enlargement of a mere statute of limitations was constitutionally permissible. *See* 115 U.S. at 625-27. Shadburne's contention that *Danzer* does not apply to statutes of repose because such statutes have typically been analyzed in the choice of law context cannot be sustained.

C. *Danzer* is not limited to statutory causes of action.

In another attempt to narrow *Danzer*, Shadburne suggests that the Court of Appeals alternatively could have distinguished *Danzer* on the grounds that the timeliness provision in *Danzer* was contained in the statute that created the cause of action. (Shad. Opp. at 9-10.) Without citing anything from *Danzer* itself, Shadburne asserts that the statutory basis of the cause of action was "clearly the basis of the Court's ruling in 1925." (Shad. Opp. at 9.) Shadburne then departs sharply from the Court of Appeals opinion: whereas the Court of Appeals correctly found that *Chase* reaffirmed the rule that to enlarge a substantive time bar would unconstitutionally revive an extinguished liability (Pet. App. at 8a), Shadburne contends that *Chase* limited *Danzer* to statutory causes of action. (Shad. Opp. at 9.)

Shadburne's view contravenes both the case law and common sense. As described in the Petition (Petition at 6-7), *Chase* reaffirmed *Danzer*'s explicit reliance upon the question of whether the timeliness rule at issue "operates as a limitation upon liability" as opposed to merely "apply[ing] to the remedy only." Shadburne never addresses this analysis. Moreover, as noted above, Shadburne's mechanical rule does not account for the clear convergence of the defining features of statutes of repose and the defining features of the class of timeliness rules that may not be enlarged under *Danzer*. Shadburne herself is forced to make the critical admission

that the Oregon statute of repose has the effect of conferring "immunity" (Shad. Opp. Questions Presented for Review), bringing it within the *Danzer/Chase* rule.

Shadburne's analysis also conflicts with *Midstate Horticultural Co. v. Pennsylvania R.R. Co.*, 320 U.S. 356 (1943), where the Court rejected in another context the mechanical approach that she proposes here. *See* 320 U.S. at 360. Similarly, in *Davis v. Valley Distributing*, 522 F.2d 827 (9th Cir. 1975), the court specifically held that "[a] close reading of *Chase Securities* indicates that the Supreme Court did not distinguish *Danzer* on the ground that the limitations provision was contained in the statute that created the substantive liability." *Id.* at 830 n.7.[2/]

D. Shadburne's "alternate reasons" in support of the Court of Appeals decision are without merit and, in any event, are irrelevant to the question of whether certiorari should be granted.

The "alternate reasons not expressed in [the Court of Appeals] opinion" that ostensibly support that opinion (Shad. Opp. at 12-14) are red herrings. These supposed alternative bases for reversal after remand do not affect the cert worthiness of the cleanly defined constitutional issue presented in the Petition.

2/ Shadburne asserts that the argument found to be an incorrect reading of *Danzer* in *International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976), was "identical" to the Trust's position here. (Shad. Opp. at 7 n.3.) The defendant in that case appears to have argued that the enlargement at issue was unconstitutional because the cause of action was statutory. This incorrect argument is identical to Shadburne's, not the Trust's.

The points are without merit anyway. The fact that the statute of repose was not enacted until after Shadburne's IUDs were inserted (Shad. Opp. at 12-13) does not preclude reliance upon the statute. *E.g.*, *Marinelli v. Ford Motor Co.*, 696 P.2d 1, 4, *rev. denied*, 701 P.2d 784 (Or. 1985). Shadburne's argument that her claim is timely even under the preexisting statute of repose (Shad. Opp. at 13) is squarely barred by *Dortch v. A.H. Robins Co.*, 650 P.2d 1046 (Or. App. 1982), where the court dismissed a Dalkon Shield claim on identical facts. *See Border v. Indian Head Indus.*, 792 P.2d 111, 114 (Or. App. 1990) (expressly approving the result in *Dortch*).[3/]

Shadburne also refers to "public policy issues," arguing for some unspecified reason that it would be particularly unjust to hold Oregon women to the consequences of the Oregon statute of repose. (Shad. Opp. at 13.) Shadburne does not even attempt to connect these issues to the constitutional issue presented. In any event, a litigant's ability to succeed in a tort suit always depends on the terms of the governing state law. In addition, though it is true that the Trust is neither a manufacturer nor an insurance company (Shad. Opp. at 14), Shadburne has not shown the relevance of that point to the Court's ability to address fully the constitutional issue presented. There is simply no reason why any of these alternate reasons, even if they were meritorious, should affect this Court's decision on this petition for certiorari.[4/]

3/ Shadburne waived this argument by failing to raise it in prior appeals as well as in the District Court.

4/ Given Shadburne's repeated references to her injuries, it bears emphasis that this case was decided at the pleadings stage. Although Shadburne is entitled to the benefit of her allegations, it of course

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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remains to be determined whether she has suffered any injury caused by the Dalkon Shield.